86 1376

Supreme Court, U.S.
FILED
FEB 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

A.G. BECKER INCORPORATED,

Petitioner,

— vs. —

FIRST BISCAYNE CORPORATION, STEVEN J. HURTIG and IRENE S. GREENSTEIN, as Trustee under Trust Document Dated February 22, 1968,

Respondents,

MELVYN GREENSTEIN,

Third-Party Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

A. ROBERT PIETRZAK
Counsel of Record for Petitioner
A.G. Becker Incorporated
One World Trade Center
57th Floor
New York, New York 10048
(212) 839-5300

Of Counsel:
BROWN & WOOD
A. ROBERT PIETRZAK, ESQ.
DEBORAH H. FRATI, ESQ.

QUESTION PRESENTED

Are federal district courts barred from enforcing pre-dispute agreements to arbitrate claims based upon an implied right of action under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78a?

The following pages contain a Rule 28.1 listing of all parent companies, non-wholly owned subsidiaries and affiliates of A.G. Becker Incorporated.

A.G. Becker Incorporated
(now known as Merrill
Lynch Money Markets Inc.)
Paribas Corporation
Paribas International

Merrill Lynch & Co., Inc.
Merrill Lynch, Pierce, Fenner & Smith Incorporated
Broadcort Capital Corp.
Broadcort Corporation
Merrill Lynch & Co., Canada Ltd.
Merrill Lynch Canada Incorporated/Incorporee
Merrill Lynch Life Agency Inc. (Arizona)
Merrill Lynch Life Agency Inc. (Arkansas)
Merrill Lynch Life Agency Inc. (Idaho)
Merrill Lynch Life Agency Inc. (Illinois)
Merrill Lynch Life Agency Inc. (Massachusetts)
Merrill Lynch Life Agency Inc. (Montana)
Merrill Lynch Life Agency Inc. (New Mexico)
Merrill Lynch Life Agency Inc. (Ohio)
Merrill Lynch Life Agency Inc. (Oklahoma)
Merrill Lynch Life Agency Inc. (Puerto Rico)
Merrill Lynch Life Agency Inc. (South Dakota)
Merrill Lynch Life Agency Inc. (Virgin Islands)
Merrill Lynch Life Agency Inc. (Washington)
Merrill Lynch Life Agency Inc. (Alabama)
Merrill Lynch Life Agency of Maine, Inc.
Merrill Lynch Settlement Services, Inc. (California)
MLSS Insurance Agency, Inc.
Merrill Lynch Settlement Services, Inc. (Florida)
Merrill Lynch Tort Settlement Company, Inc.
Merrill Lynch Life Agency Ltd. (Mississippi)
Merrill Lynch-Nomura Management Company, Inc.
Merrill Lynch Princeton Incorporated
ML Life Agency Inc.
R O C - Denver, Inc.
R.O.C. - Florida, Inc.
R O C - Texas, Inc.
Securities Options Corp.

BEST AVAILABLE COPY

Wagner Stott Clearing Corp.
White Weld (Latin America) Incorporated (Inactive)
Becker Paribas Holding Company Incorporated
Dacion Corp.
Family Life Insurance Company
Merrill Lynch Life Insurance Company
Goodbody & Co. Incorporated
Goodbody Leasing Corp.
Merrill Lynch Offshore Funding, Inc.
Merrill Lynch Overseas Capital N.V.
Kecalp Inc.
Merrill Lynch Asset Management, Inc.
Fund Asset Management, Inc.
Merlease Leasing Corp.
Merrill Lynch Economics, Inc.
Merrill Lynch Funds Distributor, Inc.
Merrill Lynch International Capital Management Co., Ltd.
Merrill Lynch Bank & Trust Co.
Merrill Lynch Capital Partners, Inc.
Merrill Lynch Capital Resources Inc.
B&M Resources Corporation
Merrill Lynch Energy Investments Inc.
Merrill Lynch Interfunding Inc.
ML-UNC Investment Inc.
Merrill Lynch International Finance Corporation
Merrill Lynch International Bank Limited
Merrill Lynch Bank (Suisse) S.A.
Mership Nominees Limited
Merrill Lynch Leasing Inc.
Astor Partners Inc.
Aztex Corporation
Balkhouse Properties Corp.
Cedar Partners Inc.
Dover Partners Inc.
First 165 Properties Corp.
Flemtex Properties Corp.
Hannibal Properties Corp.

Imaging Sciences, Inc.
Kansiana Properties Corp.
Lynx Properties Corp.
Maiden Lane Partners Inc.
Matavia Corp.
Michigan Mart Properties Corp.
ML Auburn Corporation
ML Balkhouse Properties Corp.
ML Caverns Inc.
ML Clay Inc.
ML Computer Leasing Inc.
ML Cortlandt Realty Corporation
ML Dover Properties, Inc.
ML Hannibal Properties Corp.
ML Kansiana Properties Corp.
MLL Displays Inc.
ML Leasing Equipment Corp.
ML Leasing Intermodal Inc.
ML Leasing Management, Inc.
ML Leasing Partners, Inc.
ML Leasing Servicing Inc.
ML Ponserv Inc.
MLL Leasing Corp.
MLL Windpower Inc.
ML Media Management Inc.
ML Onyx Properties Corp.
ML Pennington Properties Corp.
ML Pontiac Properties Corp.
Peapack Properties, Inc.
Pennington Properties Corp.
Siltex Properties Corp.
Test Properties, Inc.
Third 165 Properties Corp.
Way Hawthorne Properties Corp.
Way Modesto Properties Corp.
Whitehall Partners Inc.
Merrill Lynch Private Capital Inc.

Merrill Lynch Private Capital Limited
PCRE Inc.
South Point Inc.
Merrill Lynch R&D Management Inc.
Merrill Lynch SBL, Inc.
Merrill Lynch Venture Capital Inc.
MLL Corporate Partners Inc.
ML Vessel Leasing Corporation
PDDB Funding Corporation
Merrill Lynch Capital Services, Inc.
Merrill Lynch Financial Data Service, Inc.
Merrill Lynch Futures Inc.
Merrill Lynch Futures (Japan) Co. Ltd.
Merrill Lynch Futures (S) Pte. Ltd.
Merrill Lynch Metals Inc.
Merrill Lynch Government Securities Inc.
Becker Holdings Incorporated
Merrill Lynch Money Markets Inc.
Merrill Lynch Money Markets, London, Inc.
Merrill Lynch Government Securities of Puerto Rico S.A.
Merrill Lynch Mortgage Capital Inc.
Merrill Lynch/Great Western Mortgage Securities, Inc.
Merrill Lynch International Incorporated
C.P.W. Limited
C.P.W. Consulting GmBH
Merrill Lynch-Ayala International Pte Ltd
Merrill Lynch Chile S.A.
Merrill Lynch International (Australia) Limited
Merrill Lynch International Bank
Merrill Lynch International Capital Management (Guernsey) Limited
Merrill Lynch International Holdings Inc.
Merrill Lynch Europe Limited
Merrill Lynch Equities Limited

Merrill Lynch Government Securities Company
Merrill Lynch Government Securities (Nominees) Limited
Merrill Lynch Limited
Merrill Lynch Nominees Limited
Merrill Lynch, Pierce, Fenner & Smith (Brokers & Dealers) Limited
Merrill Lynch, Pierce, Fenner & Smith Limited
Merrill Lynch International Bank Incorporated
Iran Financial Services Company S.S.K. (inactive)
Merrill Lynch Asset Management Limited
Merrill Lynch (Australia) Pty Limited
Merrill Lynch Europe S.A.
Merrill Lynch AG
Merrill Lynch N.V.
Merrill Lynch, Pierce, Fenner & Smith S.A.
Merrill Lynch International & Co.
Merrill Lynch International Management Limited (Inactive)
Merrill Lynch (Malaysia) Sdn Bhd
Merrill Lynch Philippines Inc.
Merrill Lynch, Pierce, Fenner & Smith de Argentina Sociedad Anonima Financiera, Mobiliaria y de Mandatos
Merrill Lynch, Pierce, Fenner & Smith Belge S.A.
Merrill Lynch, Pierce, Fenner & Smith Espanola, S.A.
Merrill Lynch, Pierce, Fenner & Smith Gesellschaft m.b.H.
Merrill Lynch, Pierce, Fenner & Smith (Hellas) L.L.C.
Merrill Lynch, Pierce, Fenner & Smith International Limited (In Dissolution)
Merrill Lynch, Pierce, Fenner & Smith (Middle East) S.A.L.

Merrill Lynch, Pierce, Fenner & Smith (Singapore) Pte. Ltd.
Merrill Lynch, Pierce, Fenner & Smith (Taiwan) Ltd.
Merrill Lynch, Pierce, Fenner & Smith Uruguaya Sociedad Anonima
Merrill Lynch, Pierce, Fenner & Smith Venezolana S.R.L.
Merrill Lynch, Pierce, Fenner & Smith Maracaibo S.R.L. (Inactive)
Merrill Lynch S.p.A.
Property Protection Associates & Co. (Inactive)
Royal Securities Corporation (Canada) Limited
Merrill Lynch International Investments Inc.
Merrill Lynch-Sun Hung Kai (Overseas Securities) Company
Sun Hung Kai & Co. Limited
Merrill Lynch, Pierce, Fenner & Smith S.A.F Limited
Merrill Lynch Representacoes Ltda
Merrill Lynch Servicos S/C Ltda
Merrill Lynch S.A. Distribudora De Titulos E Valores Mobiliarios
Merrill Lynch S.A.M.
Prismbond Limited
Prismbond GmbH
Merrill Lynch Realty, Inc. (a Delaware Corporation)
Merrill Lynch Acceptance Corporation
Merrill Lynch Equity Management, Inc.
Merrill Lynch Equity Management of Iowa, Inc.
Merrill Lynch Equity Management West Virginia Inc.
MLEM Insurance Agency, Inc. (California)
MLEM Insurance Agency, Inc. (Connecticut)
Merrill Lynch, Hubbard Inc.
Hubbard Advisory Corporation
Hubbard, Westervelt & Mottelay, Inc. (Inactive)
Merrill Lynch Corporate Pass-Through Securities, Inc.

Merrill Lynch, Hubbard Holdings Inc.
Merrill Lynch Hubbard Public Storage Corp.
Merrill Lynch Hubbard of Puerto Rico S.A.
MLH Group Inc.
Cumberland, Inc.
MLH Depositary Inc.
MLH Equity Advisors Inc.
MLH Foreign Transfer Agency Inc.
MLH Income Properties Inc.
MLHP Incorporated
MLH Income Properties II Inc.
MLHP II Incorporated
MLH Income Properties III Inc.
MLHP III Incorporated
MLH Income Properties IV Inc.
MLHP IV Incorporated
Referral Associates of Georgia, Inc.
Referral Associates of Illinois, Inc.
Referral Associates of Louisiana, Inc.
Referral Associates of Maryland, Inc.
Referral Associates of Michigan, Inc.
Referral Associates of Minnesota, Inc.
Referral Associates of Missouri, Inc.
Referral Associates of Nevada, Inc.
Referral Associates of New Jersey, Inc.
Referral Associates of New York, Inc.
Referral Associates of North Carolina, Inc.
Referral Associates of Oklahoma, Inc.
Referral Associates of Pennsylvania, Inc.
Referral Associates of Texas, Inc.
Referral Associates of Virginia, Inc.
Referral Associates of Washington, Inc.
Referral Associates of Wisconsin, Inc.
Merrill Lynch Realty Commercial Services, Inc.
Doe Valley Housing Inc. (Inactive)
First Europroperties, Inc.
Fourth Europroperties, Inc.

Merrill Lynch Commercial Real Estate of Louisiana, Inc.
Merrill Lynch Huntoon Paige Inc.
Merrill Lynch MBS, Inc.
Merrill Lynch Realty Commercial Services of Arizona Inc.
Merrill Lynch Realty Commercial Services of California, Inc.
Merrill Lynch Realty Commercial Services of Connecticut Inc.
Merrill Lynch Realty Commercial Services of Florida Inc.
Merrill Lynch Realty Commercial Services of Georgia, Inc.
Merrill Lynch Realty Commercial Services of Illinois Inc.
Merrill Lynch Realty Commercial Services of Maryland Inc.
Merrill Lynch Realty Commercial Services of New Jersey Inc.
Merrill Lynch Realty Commercial Services of New York Inc.
Merrill Lynch Realty Commercial Services of North Carolina Inc.
Merrill Lynch Realty Commercial Services of Oklahoma Inc.
Merrill Lynch Realty Commercial Services of Pennsylvania Inc.
Merrill Lynch Realty Commercial Services of Texas Inc.
Merrill Lynch Realty Commercial Services of Virginia Inc.
Merrill Lynch Realty Commercial Services of Washington Inc.
Merrill Lynch Realty Commercial Services of Washington, D.C. Inc.
Merrill Lynch Realty Commercial Services of Wisconsin Inc.
Merrill Lynch Realty Securities Corporation Miami Sunset Inc.
Sunset-Toledo Land Company of Miami, Inc.
Second Europroperties, Inc.
Sunset Euro Properties, Inc.
Third Europroperties, Inc.

Merrill Lynch Relocation Management Inc.
Merrill Lynch Relocation Management of Canada Limited
Merrill Lynch Relocation Management International Limited
Merrill Lynch Realty/Houston, Inc.
Merrill Lynch Realty, Inc. (Arizona)
Merrill Lynch Realty, Inc. (Connecticut)
Merrill Lynch Realty, Inc. (District of Columbia)
Merrill Lynch Realty, Inc. (Florida)
Merrill Lynch Realty, Inc. (Illinois)
Merrill Lynch Realty, Inc. (Louisiana)
Merrill Lynch Realty, Inc. (Oklahoma)
Merrill Lynch Realty/Jack Matthews, Inc.
Merrill Lynch Realty/Katella, Inc.
Merrill Lynch Realty/MCK, Inc.
MCK Real Estate Education Centers, Inc.
Merrill Lynch Realty/Michigan, Inc.
Merrill Lynch Realty/Mid-Atlantic, Inc.
Merrill Lynch Realty/New Jersey, Inc.
Merrill Lynch Realty/New York, Inc.
Merrill Lynch Realty North Bay Inc.
Merrill Lynch Realty/North Los Angeles, Inc.
Major Escrow Corp.
Major Assurance Corp.
Santa Barbara Escrow Company
Merrill Lynch Realty/Paula Stringer, Inc.
Merrill Lynch Realty/Powell & Yanson, Inc.
Merrill Lynch Realty/Richard Jowdy, Inc.
Western Connecticut Real Estate School, Inc.
Merrill Lynch Realty/Robedeaux, Inc.
Merrill Lynch Realty/Robedeaux Commercial Inc.
Merrill Lynch Realty/San Diego, Inc.
Merrill Lynch Realty/San Francisco, Inc.
Merrill Lynch Realty Santa Barbara Inc.
Unique Escrow Company
Merrill Lynch Realty/South Bay, Inc.
Merrill Lynch Realty/Tom Fannin Inc.

Merrill Lynch Relocation Services, Inc.
- Merrill Lynch Relocation Services of California, Inc.
- Merrill Lynch Relocation Services of Maryland, Inc.
- Merrill Lynch Relocation Services of Minnesota, Inc.
- Merrill Lynch Relocation Services of Oklahoma, Inc.
- Merrill Lynch Relocation Services of Pennsylvania, Inc.
- Merrill Lynch Relocation Services of Virginia, Inc.

ML/Rodgers & Cummings Insurance, Inc.
Network 50, Inc.
Referral Associates, Inc.
- Affiliate Referral Corporation
- Referral Associates of Arizona, Inc.
- Referral Associates of Arkansas, Inc.
- Referral Associates of California, Inc.
- Referral Associates of Colorado, Inc.
- Referral Associates of Connecticut, Inc.
- Referral Associates of District of Columbia, Inc.
- Referral Associates of Florida, Inc.

MLH Income Properties V Inc.
MLH Management Corporation
MLH Preferred Real Estate Inc.
- MLHPREF Incorporated

MLH Private Placements Inc.
- MLHPRIV Incorporated
- MLHPRIV II Incorporated

MLH Property Managers Inc.
- MLHIR Incorporated

MLH Property Managers II Inc.
- MLHIR II Incorporated

MLH Property Managers III Inc.
- MLHIR III Incorporated

MLH Property Managers IV Inc.
- MLHIR IV Assignor Inc.
- MLHIR IV Incorporated

MLH Property Managers V Inc.
- MLHIR V Assignor Inc.
- MLHIR V Incorporated

MLH Property Managers VI Inc.
MLHIR VI Assignor Inc.
MLHIR VI Incorporated
MLH Property Managers VII Inc.
MLHIR VII Assignor Inc.
MLHIR VII Incorporated
MLH Property Managers VIII Inc.
MLHIR VIII Assignor Inc.
MLHIR VIII Incorporated
Two Broadway Incorporated
Two Broadway IV Incorporated
Merrill Lynch Mortgage Corporation
Merrill Lynch Realty Insurance Services, Inc.
Merrill Lynch Realty Insurance Services of California, Inc.
Merrill Lynch Realty Insurance Services of Florida, Inc.
Merrill Lynch Realty Insurance Services of Maryland, Inc.
Merrill Lynch Realty Insurance Services of Virginia, Inc.
UFM Financial Corporation
Merrill Lynch Realty Associates, Inc.
Hammill-Quinlan, Inc.
Merrill Lynch Realty/Beverly Hills, Inc.
Merrill Lynch Realty/Sandler-Adler, Inc.
Merrill Lynch Realty/Boomhower, Inc.
Merrill Lynch Realty/Burnet, Inc.
ML/Burnet Insurance Agency, Inc.
Merrill Lynch Realty Carll Burr, Inc.
Merrill Lynch Realty/Chris Coile, Inc.
Merrill Lynch Institute of Real Estate, Inc.
Merrill Lynch Realty/Cousins, Inc.
Merrill Lynch Realty/Florida, Inc.
Merrill Lynch Realty/Georgia, Inc.
Merrill Lynch Specialists Inc.
Merrill Lynch Technology Group Inc.
Merrill Lynch Communications Investments Inc.
International MarketNet, L.P.

Merrill Lynch FSS, Inc.
Merrill Lynch Software and Information Services, Inc.
Merrill Lynch Telecommunications Incorporated
Teleport Communications
Merrill Lynch/WFC/B Holdings, Inc.
Merrill Lynch/WFC/D Properties, Inc.
Merrill Lynch/WFC/L, Inc.

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Uniform Code of Arbitration, N.A.S.D. Manual (CCH) ¶¶3712-3743 8

STATUTORY AND REGULATORY PROVISIONS INVOLVED*

United States Arbitration Act

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Section 3, 9 U.S.C. § 3

Securities Act of 1933

Section 12(2), 15 U.S.C.§ 771(2)
Section 14, 15 U.S.C. § 77n

Securities Exchange Act of 1934

Section 10(b), 15 U.S.C. § 78j(b)
Section 29(a), 15 U.S.C. § 78cc(a)

Securities and Exchange Commission Regulation

Rule 10b-5, 17 C.F.R. § 240.10b-5
Rule 15c2-2, 17 C.F.R. § 240.15c2-2

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* The text of these provisions is reproduced at Appendix A hereto.

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

A.G. BECKER INCORPORATED,

Petitioner,

— VS. —

FIRST BISCAYNE CORPORATION, STEVEN J. HURTIG and IRENE S. GREENSTEIN, as Trustee under Trust Document Dated February 22, 1968,

Respondents,

MELVYN GREENSTEIN,

Third-Party Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner A.G. Becker Incorporated ("Becker"), one of the defendants below,[1] respectfully prays (a) that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Eleventh Circuit, dated December 18, 1986. That decision reversed an Order of the United States District Court for the Southern District of Florida; and (b) that upon issuance of a writ of certiorari, consideration by this Court of the

[1] First Biscayne Corporation and Steven J. Hurtig, defendants below, have been named as Respondents herein in accordance with United States Supreme Court Rule 19(6). These Respondents have not indicated whether they wish to join in this petition.

Eleventh Circuit decision be withheld pending the issuance of the Court's opinion in *Shearson/American Express, Inc. v. McMahon*, No. 86-44 (1986); and (c) that, to the extent the issue presented here is unresolved by *McMahon*, this Court resolve that issue in this case.

The District Court enforced a pre-dispute agreement between Becker and respondents/plaintiffs to arbitrate all disputes arising out of their customer-broker relationship, by ordering arbitration of plaintiff's claims under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78a, § 78j(b)("Section 10b") (1982) (the "Exchange Act").

On appeal, the Eleventh Circuit reversed the District Court and ruled that district courts within its jurisdiction were barred from enforcing agreements to arbitrate claims arising under Section 10(b). *Greenstein v. First Biscayne Corporation, et al.*, Nos. 85-5512 and 85-5626, slip. op. (11th Cir. Dec. 18, 1986). The Eleventh Circuit held that *Wilko v. Swan*, 346 U.S. 427 (1953), and its own precedents, *see Wolfe v. E.F. Hutton and Company, Inc.*, 800 F.2d 1032 (11th Cir. 1986), compelled its result for Section 10(b) claims.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reproduced at Appendix B hereto. The opinion of the United States District Court for the Southern District of Florida is reproduced at Appendix C hereto.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

STATEMENT OF THE CASE

This action involves a purportedly unauthorized transaction in a securities account maintained by the respondent/plaintiff Irene S. Greenstein ("Greenstein") at First Biscayne Corporation, a Miami broker-dealer registered with the Securities and Exchange Commission. From 1976 to 1981, Greenstein engaged

in a variety of uncontested securities trades in that account. Then, in the summer of 1981, Greenstein alleges that First Biscayne's president, Hurtig, entered a purchase transaction for United States Treasury Bonds without the prior approval of her or her husband. Greenstein seeks to recover her purported losses from that transaction not only from First Biscayne and Hurtig, but also from Becker, the registered broker-dealer in New York through which First Biscayne cleared its transactions, pursuant to common industry practice, on a fully-disclosed basis.

The complaint herein asserts a single federal claim under Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5 of the Securities and Exchange Commission promulgated thereunder. 17 C.F.R. § 240.10b-5. The remaining counts of the complaint, based on the same underlying facts as the purported federal claim, are asserted under state law. Becker has denied the allegations of the complaint and has asserted third party claims against Greenstein's husband, Melvyn Greenstein, on the grounds that he authorized the transaction in question on behalf of Greenstein with her authority, if not her knowledge.

As clearing broker for First Biscayne, Becker performed a number of services, including the extension of credit for margin transactions entered for the accounts of First Biscayne's customers. In that regard, Greenstein signed a "Margin Agreement/Loan Consent" which, *inter alia*, contained an "Agreement to Arbitrate Controversies" with Becker. The relevant portion of the agreement provides that:

> any controversy between us arising out of your business or this agreement shall be submitted to arbitration conducted under the provisions of the Constitution and Rules of the Board of Governors of the New York Stock Exchange or pursuant to the Code of Arbitration of the National Association of Securities Dealers, as the undersigned may elect.

On April 9, 1985, Becker filed a motion to compel arbitration in light of the decision of the United States Supreme Court

in *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985). On May 16, 1985, the district court entered an order granting Becker's motion to compel arbitration of all claims and dismissing this action. Greenstein filed her notice of appeal from the May 16, 1985, order on June 14, 1985.

In addition, on May 22, 1985, Greenstein filed a motion for relief from the May 16, 1985, order of the district court, Case No. 85-5626, which motion was also denied. Greenstein filed her notice of appeal from the district court's denial of relief on July 25, 1985. The two appeals were consolidated before the court of appeals.

The Eleventh Circuit ruled that district courts within its jurisdiction may not enforce pre-dispute arbitration agreements insofar as they apply to claims under Section 10(b) of the Exchange Act.

On January 6, 1987, Becker moved, pursuant to F.R.A.P. 41(b), for a stay of the Eleventh Circuit's mandate pending the within application for a writ of certiorari to this Court, and the requested stay was granted to February 20, 1987.

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit's decision, holding that pre-dispute arbitration agreements are unenforceable under the Exchange Act, is in agreement with the decisions of four other circuits and in conflict with two circuits. The following circuits are in agreement with the Eleventh Circuit: *McMahon v. Shearson/American Express, Inc.*, 788 F.2d 94 (2d Cir.), *cert. granted*, 55 U.S.L.W. 3197 (U.S. Oct. 6, 1986) (No. 86-44); *Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 797 F.2d 1197 (3d Cir. 1986), *petition for cert. pending*, No. 86-487 (1986); *Conover v. Dean Witter Reynolds Inc.*, 794 F.2d 520 (9th Cir. 1986); *Mayaja, Inc. et al. v. Bodkin, et al.*, 803 F.2d 157 (5th Cir. 1986), *petition for cert. pending*, No. 86-1160 (1987). Decisions in conflict are *Phillips v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 795 F.2d 1393 (8th Cir. 1986), *petition for cert. pending*, No. 86-578 (1986), and the decision of the First Circuit in *Page v. Moseley, Hallgarten, Estabrook & Weeden, Inc.*, [Current] Fed. Sec. L. Rep. (CCH) ¶93,001 (1st Cir. 1986).

As a result of the conflict among the circuits, this Court granted certiorari in *McMahon* and will hear oral argument on that case on March 3, 1987. If the Court does not resolve the conflict among the circuits on the arbitrability of Section 10(b) claims in *McMahon*, Becker respectfully requests that the Court do so in this case.

The Eleventh Circuit's decision on Section 10(b) claims conflicts with recent decisions of this Court and with the clear mandate of Congress in the Arbitration Act, that all doubts are to be resolved in favor of arbitration.

Until this issue is resolved, parties to arbitration agreements will continue to be deprived of an efficient, expeditious, and less expensive alternative to federal courts for settling their disputes. Meanwhile, each passing day will clog the courts with more motions raising this issue, and with more lawsuits asserting claims that should be determined through arbitration.

I. To the Extent the Question is Not Resolved in *Shearson v. McMahon*, No. 86-44, This Court Should Grant Certiorari to Decide Whether Congress Intended to Prohibit the Enforcement of Agreements to Arbitrate Claims Arising Under Section 10(b) of the Exchange Act.

The Eleventh Circuit rendered an opinion in direct conflict with the prior holdings of the Eighth and First Circuits in *Phillips* and *Page*. The result is a direct conflict among the Circuits. This fundamental conflict among circuit courts of appeals should be resolved.

A. The Eleventh, First and Eighth Circuit Courts of Appeals Are in Direct Conflict As to Whether the *Wilko v. Swan* Exception to the Arbitration Act for Claims Under Section 12(2) of the Securities Act of 1933 Should Be Extended to Claims Under Section 10(b) of the Exchange Act.

Congress did not create a private remedy for violations of Section 10(b) of the Exchange Act. Instead, a judicially-implied

private right of action evolved over the years. *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 380 (1983). Plaintiffs in securities actions now routinely claim violations of Section 10(b), usually on the basis of the same facts alleged to support a claim of common law fraud. Common law fraud claims, of course, are arbitrable even if they are based upon the same allegations as federal securities law claims. *Byrd*, 470 U.S. 213, at 216-17. Whether Section 10(b) claims can be arbitrated is, however, a question that has split the district and circuit courts.

The arguments on both sides of this issue have been fully developed over the years in decisions from this Court, from the circuit courts of appeals, and from numerous district courts. Further consideration by the lower courts will create continued conflict, not clarification.

1. **The Eleventh Circuit's decision in this case rests upon its own precedents extending *Wilko v. Swan* to Section 10(b) claims and its own view of public policy rather than any analysis of Congressional intent.**

The Eleventh Circuit gave only one reason for precluding enforcement of agreements to arbitrate Section 10(b) claims: prior Eleventh Circuit precedent extending *Wilko v. Swan*, 346 U.S. 427 (1953) to Section 10(b) claims. *Greenstein, supra*, at p. 2.[2]

In *Wilko*, this Court determined that the "non-waiver" provision of the Securities Act of 1933, 15 U.S.C. § 77a, *et seq.* (1982) (the "1933 Act"), when coupled with the explicit and unique procedural and substantive rights granted under Section 12(2) of that Act, barred enforcement of an agreement to arbitrate that explicitly-created remedy. The *Wilko* Court held that the right to select a judicial forum was a "provision" of the 1933 Act, and thus subject to Section 14 of the 1933 Act, 15 U.S.C. § 77n (1982), which voids any "stipulation" waiving compliance with any "provision" of that Act. *Wilko*, 346 U.S. at 434-35.

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[2] See *Wolfe v. E.F. Hutton & Company, Inc.*, 800 F.2d 1032 (11th Cir. 1986).

The reasoning of *Wilko* was thus limited to the specific language of the 1933 Act, and in particular to the express statutory remedy in Section 12(2). As this Court has recently reconfirmed, the 1933 Act and the Exchange Act should not necessarily be construed *in pari materia*, but should be analyzed separately according to the language and purpose of each statute. *Randall v. Loftsgaarden*, ____ U.S. ____, 106 S.Ct. 3143, 92 L.Ed.2d 525 (1986).

Nevertheless, several circuit courts of appeals, prior to this Court's decision in Byrd, extended *Wilko* to bar arbitration of Section 10(b) claims.[3] Even those courts that extended *Wilko* to Section 10(b) claims did not forbid the arbitration of all securities law claims. For example, *Wilko* does not apply to disputes between members of the securities exchanges or the National Association of Securities Dealers, Inc. who are subject to rules mandating arbitration. *See, e.g., Halliburton & Assocs. Inc. v. Henderson, Few & Co.*, 774 F.2d 441, 444-45 (11th Cir. 1985); *Coenen v. R.W. Pressprich & Co.*, 453 F.2d 1209, 1212 (2d Cir.), *cert. denied*, 406 U.S. 949 (1972). Nor does *Wilko* apply where arbitration is selected after the dispute has arisen. *See, e.g., Coenen*, 453 F.2d at 1213; *Gardner v. Shearson, Hammill & Co.*, 433 F.2d 367, 368 (5th Cir. 1970) (*per curiam*), *cert. denied*, 401 U.S. 978 (1971).

Indeed, the securities industry, in conjunction with the Securities and Exchange Commission ("SEC") and other interested parties, has established and developed procedures for arbitrating securities law claims that provide protection to the public and to the policies underlying the securities

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[3] *See Surman v. Merrill Lynch, Pierce, Fenner & Smith*, 733 F.2d 59, 61-62 (8th Cir. 1984); *Belke v. Merrill Lynch, Pierce, Fenner & Smith* 693 F.2d 1023, 1025-26 (11th Cir. 1982); *DeLancie v. Birr, Wilson & Co.*, 648 F.2d 1255, 1258-59 (9th Cir. 1981); *Mansbach v. Prescott, Ball & Turben*, 598 F.2d 1017, 1030 (6th Cir. 1979); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Moore*, 590 F.2d 823, 827-29 (10th Cir. 1978); *Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 558 F.2d 831 (7th Cir. 1977).

laws.[4] Contrary to any concern that may have been expressed by the courts about the ability of arbitrators to resolve securities law claims fairly and competently, the historical evidence demonstrates that arbitration governed by these procedures effectively carries out the public policies underlying the securities laws. *See* C. Katsoris, *The Arbitration of a Public Securities Dispute*, 53 Fordham L. Rev. 279 (1984).

The SEC is the federal agency principally concerned with the administration and enforcement of the federal securities laws and regulations, including Section 10(b) and Rule 10b-5. The SEC is responsible for overseeing and regulating the activities of stock exchanges and securities associations, including the rules they prescribe for arbitration of cases such as the one at bar. The SEC's authority to do so arises from Section 19 of the Exchange Act, 15 U.S.C. § 78s. It is significant that, as the federal agency charged with ensuring that the securities laws are adequately enforced, the SEC supports the arbitration of securities disputes such as this one, involving Section 10(b) and Rule 10b-5.

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[4] Arbitration is a structured forum subject to a clear set of rules. *See, e.g.*, Constitution of the New York Stock Exchange, Inc., Art. VIII, 2 N.Y.S.E. Guide (CCH) ¶¶ 1351-1357; Arbitration Rules 600-634 of the New York Stock Exchange, Inc., 2 N.Y.S.E. Guide (CCH) at ¶¶2600-2634. *See generally*, Uniform Code of Arbitration, N.A.S.D. Manual (CCH) ¶¶3712-3743. These rules have been expressly approved by the SEC, which has found them to be in the public interest and in furtherance of just and equitable principles of trade. *See* SEC Securities Exchange Act Release No. 16390 (Nov. 30, 1979), 18 S.E.C. Docket 1197 (1979).

The SEC, moreover, retains jurisdiction to correct any perceived abuses or unfairness in the arbitration rules, pursuant to Section 19 of the Exchange Act, 15 U.S.C. § 78s (1982). Furthermore, arbitrators are bound to follow the law in adjudicating Section 10(b) claims. *Wilko*, 346 U.S. at 436 (1953). Manifest disregard of the law is one ground to vacate an arbitration award. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 636 F.Supp. 444 (S.D.N.Y. 1986) (Weinfeld, J.) (manifest disregard of law under Rule 10b-4 required arbitrators' award to be vacated), *rev'd on other grounds*, No. 86-7513, slip. op. (2d Cir. Dec. 23, 1986). *See also Swift Indus., Inc. v. Botany Indus., Inc.* 466 F.2d 1125-1130-31 (3rd Cir. 1972); *San Maritime Compania de Navegacion, S.A. v. Sagueny Terminals, Ltd.*, 293 F.2d 796, 801 (9th Cir. 1961).

See Brief for the Securities and Exchange Commission as Amicus Curiae Supporting Petitioners, *Shearson/American Express, Inc. v. McMahon*, No. 86-44 (1986). For reasons practically identical to those advanced by petitioner herein, the SEC has called for the Arbitration Act to be enforced. *Id.*[5]

2. The Eighth Circuit's decision in *Phillips v. Merrill Lynch* and the First Circuit's decision in *Page v. Moseley* rest upon this Court's recent pronouncements questioning the applicability of *Wilko v. Swan* to Section 10(b) claims and the explicit Congressional mandate favoring arbitration.

The Eighth and First Circuits recognized that this Court in recent years has consistently reaffirmed the strong national policy favoring arbitration. *Phillips*, 795 F.2d at 1395; *Page*, [Current] Fed. Sec. L. Rep. (CCH) ¶93,001, at 94,912-913. As the *Phillips* court noted, this Court's decision in *Wilko* remains a carefully-limited decision, based upon the special characteristics of the statutorily-created cause of action under Section 12(2) of the 1933 Act.

This Court has twice commented that *Wilko* does not control the question of the arbitrability of claims under Section 10(b) of the Exchange Act. In *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), this Court enforced an agreement to arbitrate disputes involving Section 10(b) claims in an international context, stating:

> At the outset, a colorable argument could be made that even the semantic reasoning of the *Wilko* opinion does not control the case before us. *Wilko* concerned a suit brought under § 12(2) of the Securities Act of 1933, which provides a defrauded purchaser

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[5] In addition, the SEC has effectively renounced SEC Rule 15c2-2, which codified earlier court of appeals decisions extending the *Wilko* doctrine to Section 10(b) claims. *Id. See also Phillips, supra* (Rule 15c2-2 rejected because it was based on SEC's erroneous belief that *Wilko* applies to implied rights of action under Exchange Act).

> with the "special right" of a private remedy for civil liability, 346 U.S. at 431. There is no statutory counterpart of § 12(2) in the Securities Exchange Act of 1934, and neither § 10(b) of that Act nor Rule 10b-5 speaks of a private remedy to redress violations of the kind alleged here. While federal case law has established that § 10(b) and Rule 10b-5 create an implied private cause of action, the Act itself does not establish the "special right" that the Court in *Wilko* found significant. Furthermore, while both the Securities Act of 1933 and the Securities Exchange Act of 1934 contain sections barring waiver of compliance with any "provision" of the respective Acts, certain of the "provisions" of the 1933 Act that the Court held could not be waived by Wilko's agreement to arbitrate find no counterpart in the 1934 Act.

Scherk, 417 U.S. at 513-14 (citations and footnote omitted, emphasis added).

In *Byrd*, this Court noted the doubts expressed in *Scherk* about the applicability of *Wilko* to Section 10(b) claims. It did not decide the issue, however, as the defendant had not sought to compel arbitration of the Section 10(b) claim in the district court. *Byrd*, 470 U.S. 213, n.1.

Justice White, in his concurring opinion in *Byrd*, discussed the reasoning of *Wilko* and its inapplicability to claims under Section 10(b) of the Exchange Act. He observed that the validity of the conclusion that Section 10(b) claims are not arbitrable "is a matter of substantial doubt." *Id.* at 225. He stated that "*Wilko*'s reasoning cannot be mechanically transplanted to the 1934 Act," because a private agreement to arbitrate an implied cause of action cannot constitute a waiver of a "provision" of the Exchange Act where that Act makes no provision for a private right of action. *Id.* Given that a private right of action under Section 10(b) has been judicially implied, rather than Congressionally mandated, the nonwaiver provision of the Exchange Act, Section 29(a), 15 U.S.C. § 78cc(a), "is thus literally

inapplicable." *Id.* Moreover, the virtual identity of Section 10(b) claims and claims sounding in common law fraud, which are clearly arbitrable, argues against any special exception to the Arbitration Act for Section 10(b) claims. *Id.*

The Eighth Circuit analyzed this question in light of Justice White's concurring opinion in *Byrd* and this Court's recent reaffirmation of the strong national policy favoring arbitration. The *Phillips* court noted that, unlike common law claims for fraud or deceit, Section 12(2) requires defendants to prove lack of due care. By contrast, Section 10(b) requires plaintiffs to prove *scienter*, as in common law fraud. The Eighth Circuit also noted the significant differences in the jurisdictional provisions of the two statutes. *Phillips*, 795 F.2d at 1397-98.

After careful analysis, the Eighth Circuit concluded:

> Based on these differences between the 1933 and 1934 Acts, and on the strong federal policy favoring enforcement of arbitration agreements, we conclude that *Wilko*'s holding and rationale does not extend to claims arising under section 10(b) of the 1934 Act and Rule 10b-5. The nonwaiver provision of the 1934 Act, section 29(a), simply does not override the Arbitration Act in the same manner as section 14 of the 1933 Act when it is not buttressed by special rights and broad jurisdictional provisions similar to those found in the 1933 Act. ... We hold, then, that Congress has not evinced an intention to preclude the waiver of judicial remedies for the section 10(b) and Rule 10b-5 rights at issue here.

Id. at 1398. (footnotes omitted).

Another basis for the Eleventh Circuit's prior decisions was its belief that "public policy" requires that Section 10(b) claims be heard in federal court. The Eighth Circuit, however, rejected that argument, noting:

> As support for its contention that 1934 Act claims are not arbitrable, Phillips argues that arbitration is less effective than adjudication in enforcing a plaintiff's rights under the 1934 Act. We believe that this argument, if it has any validity, is largely beside the point. Congress, through the Arbitration Act, as well as the Supreme Court have expressed increased approval for the use of arbitration rather than adjudication ... The question here is whether Congress has created an exception to the mandate of the Arbitration Act for a plaintiff's judicially implied section 10(b) and Rule 10b-5 rights. We conclude that it has not.

Id. at 1398, n. 16.

The First Circuit has also analyzed the arbitrability of Section 10(b) claims in light of Justice White's concurrence in *Byrd, supra. Page v. Moseley, Hallgarten, Estabrook & Weeden, Inc.*, [Current] Fed. Sec. L. Rep. (CCH) ¶93,001 (1st Cir. 1986). The First Circuit noted that the right to a judicial forum cannot be regarded as a nonwaivable "provision" of the Exchange Act subject to its anti-waiver clause, 15 U.S.C. § 78cc(a):

> [A]s five members of the [Supreme Court] observed in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 513-514 (1974), the 1934 Act, unlike the 1933 Act, does not *expressly* provide individuals a right to a judicial forum. Because of the absence of any express "provision" for a judicial forum under the 1934 Act, we conclude that the 1934 Act's anti-waiver clause, by itself, does not suffice to indicate a Congressional intent to preclude arbitration.

[Current] Fed. Sec. L. Rep. (CCH) ¶93,001, at 94,913 (footnotes omitted, emphasis in original).

The First Circuit went on to analyze the arbitrability *vel non* of Section 10(b) claims under *Mitsubishi Motors Corp. v. Soler Chrylser-Plymouth, Inc.*, ____ U.S. ____, 105 S.Ct. 3346 (1985).

The First Circuit recognized three "maxims" arising from *Mitsubishi*. First, "the presence of a federal statutory right cannot, without more, prevent parties from agreeing to arbitrate." [Current] Fed. Sec. L. Rep. (CCH) ¶93,001, at 94,914. Second, when determining whether federal rights are arbitrable, courts "are not to be influenced by concerns of the alleged inferiority of the arbitral forum in deciding the content of 'complex' federal statutory rights." *Id.* Third, courts should "not preclude parties from arbitrating disputes involving federal statutory rights unless [courts] find that Congress, either implicitly or explicitly, intended otherwise." *Id.* The First Circuit concluded that Congress had neither implicitly nor explicitly reserved commercial disputes under the Exchange Act for resolution by the courts, and held that Section 10(b) claims were arbitrable. *Id.*

That holding, along with the Eighth Circuit's holding in *Phillips, supra*, is in direct conflict with the Eleventh Circuit's holdings in this case. The Eleventh Circuit has adhered to its own pre-*Byrd* precedent in denying arbitration of Section 10(b) claims. *Greenstein*, slip op. at p. 2. The conflict within the circuits is clear and direct. Only this Court can resolve the conflict.

3. The Eleventh Circuit's decision conflicts with the clear intent of Congress and with this Court's recent decisions.

The Eleventh Circuit's reliance on its prior decisions conflicts with the Congressional policy codified in the Arbitration Act, in effect since 1925, and with recent decisions of this Court.

The Arbitration Act states in relevant part:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof . . . ***shall be valid, irrevocable and enforceable***, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (1982) (emphasis added). Congress intended the Arbitration Act to reverse the courts' general hostility towards arbitration agreements and to state expressly the strong public policy in favor of enforcing such agreements. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, ____ U.S. ____, 105 S.Ct. 3346, 3353-54 & n.14 (1985); *Byrd*, 470 U.S. at 219-20 & n. 6; *Southland Corp. v. Keating*, 465 U.S. 1, 10-16 (1984); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *Scherk*, 417 U.S. at 510-11. This Court has recognized that the effect of Section 2 of the Arbitration Act was to "create a body of federal substantive law of arbitrability," and that "the Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration ..." *Moses H. Cone Memorial Hosp.*, 460 U.S. at 24-25; *see also Southland Corp.*, 465 U.S. at 10-16.

In *Mitsubishi*, this Court, citing Justice White's concurring opinion in the *Byrd* case, stated that courts must enforce the federal policy favoring arbitration manifested in the Arbitration Act, absent a clear Congressional intent to create an exception. *Mitsubishi*, 105 S.Ct. at 3355. Employing that standard, this Court held that an agreement to arbitrate disputes arising out of an international business relationship was enforceable even as to antitrust claims under the Sherman Act, 15 U.S.C. § 1, *et seq.* (1982). *Id.* at 3361.

In *Mitsubishi*, this Court observed that, despite the importance of antitrust claims, there was no reason not to enforce an international agreement to arbitrate such claims:

> *By agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute*; it only submits to their resolution in an arbitral, rather than a judicial forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration. We must assume that *if Congress intended the substantive protection afforded by a given*

> *statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history*. Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.

Mitsubishi, 105 S.Ct. at 3355 (citation omitted, emphasis added). Even the dissent in *Mitsubishi*, which viewed special, statutorily-created rights as potentially exempt from the Arbitration Act, noted that Section 10(b) claims that essentially parallel contract and fraud claims may be arbitrated. *Mitsubishi*, 105 S.Ct. at 3364 (citing *Scherk*, 417 U.S. 506).

Mitsubishi thus teaches that even express statutory claims are arbitrable absent explicit Congressional intent to the contrary. The Eleventh Circuit, by refusing to enforce an agreement to arbitrate an implied right of action, gave greater weight to its own view of the importance of a judicial forum than it gave to the explicit Congressional mandate — codified in the Arbitration Act — to enforce arbitration agreements.

B. The Continued Conflict and Confusion Among the Lower Courts Over the Applicability of *Wilko v. Swan* to Section 10(b) Claims Requires Early Resolution in Order to Avoid Increased Congestion in the Lower Courts.

As long as the arbitrability of Section 10(b) claims remains unclear, the issue will be the subject of motions and appeals, which will inordinately consume the resources of the courts. In the brief period since *Byrd* was decided, more than one hundred decisions have dealt with this issue. *See* Petition for Writ of Certiorari at 16, Appendix E, *Shearson/American Express, Inc. v. McMahon*, No. 86-44 (1986). More such cases are reported every week.

In addition to the motions currently pending, new securities-related claims are constantly being filed. Statistics compiled by

the Administrative Office of the United States Courts indicate that, during the twelve months ended March 31, 1986, a total of 3,064 "Securities, Commodities, and Exchanges" private civil actions were filed in federal district courts.[6] This flood of private securities lawsuits, many raising claims subject to arbitration agreements, will continue to force the district courts to decide the enforceability of such agreements and, perhaps, to decide claims that the parties had agreed to arbitrate.

The Arbitration Act reflects a strong Congressional policy in favor of reducing congestion in the federal courts. Such congestion is one of the most serious problems facing the federal judiciary today.[7] When parties agree that a claim should be resolved out of court, only explicit Congressional intent should override that decision and require the expenditure of the time and resources required by a federal lawsuit. In this case, neither Congressional intent nor the language of the Exchange Act requires such a waste of time or judicial resources.[8]

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[6] *See* Federal Judicial Workload Statistics, prepared by the Administrative Office of the United States Courts, Statistical Analysis and Reports Division, Washington, D.C., Table C-2 at 13 (March 1986). In the year ended June 30, 1985, 3,072 such cases were filed. *See* Annual Report of the Director of the Administrative Office of the United States Courts, Table C-2 at 283 (1985). This represents a 40% increase over comparable figures for 1982. *See* Annual Report of the Director of the Administrative Office of the United States Courts, Table C-2 at 217 (1982).

[7] Speech by Former Chief Justice Warren E. Burger to the American Arbitration Association and the Minnesota Bar Association, August 21, 1985, reported by UPI on the same date; Speech by former Chief Justice Warren E. Burger at New York University, November 18, 1982, reported in the *Christian Science Monitor* on November 24, 1982.

[8] A finding that Section 10(b) claims are arbitrable will also eliminate another source of waste — the maintenance of duplicative proceedings in separate forums. As a result of this Court's decision in *Byrd*, federal courts are required to compel arbitration of state law claims. *See Byrd*, 470 U.S. at 217. If at the same time courts are required to hear federal claims based on the same facts, parallel — and most likely duplicative — proceedings will result. *See, e.g. Shotto v. Laub*, 632 F.Supp. 516, 523 & n.10, 529 (D. Md. 1986); *Steinberg v. The Illinois Company*, 635 F.Supp. 615 (N.D. Ill. 1986); *Austad v. Drexel Burnham Lambert, Inc.*, 638 F.Supp. 480 (N.D. Ill. 1986).

Petitioner respectfully submits that this Court should grant certiorari and, to the extent the issue remains unresolved by *McMahon*, resolve the conflict among the circuits by reversing the Eleventh Circuit's decision barring the enforcement of agreements to arbitrate Section 10(b) claims.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests (a) that this Court issue a writ of certiorari in this case to review the decision of the United States Court of Appeals for the Eleventh Circuit, (b) that consideration of the Eleventh Circuit's judgment be withheld pending the Court's decision in *McMahon* and this case be remanded to the Eleventh Circuit for the entry of judgment in accordance with *McMahon*, and (c) that, to the extent the arbitrability of Section 10(b) claims is not resolved in *McMahon*, the Court resolve that issue in the present case.

DATED: NEW YORK, NEW YORK
February 20, 1987

A. ROBERT PIETRZAK
Counsel of Record for Petitioner
A. G. Becker Incorporated
One World Trade Center
57th Floor
New York, New York 10048
(212) 839-5300

OF COUNSEL:

BROWN & WOOD
A. Robert Pietrzak, Esq.
Deborah H. Frati, Esq.

CERTIFICATE OF SERVICE

This will certify that true and correct copies of the foregoing Petition for Writ of Certiorari have been deposited, by first-class, postage pre-paid, with the United States Postal Service at New York, New York, and addressed to:

Richard H. Critchlow, Esq.
Finley, Kumble, Wagner, Heine,
Underberg, Manley & Casey
777 Brickell Avenue
Suite 1000
Miami, Florida 33131

Counsel of Record
for Respondent
Irene S. Greenstein
[3 copies]

Curtis Carlson, Esq.
Fowler, White, Burnett, Hurley,
Banick & Strickroot, P.A.
25 West Flagler Street
5th Floor
Miami, Florida 33130

Counsel of Record
for Defendants-Respondents
First Biscayne Corporation
and Steven J. Hurtig
[3 copies]

Steven J. Hurtig
First Biscayne Corporation
Emerald Hills Executive Center
4651 Sheridan Street
Hollywood, Florida 33021
[3 copies]

APPENDIX

APPENDIX A

STATUTORY AND REGULATORY PROVISIONS INVOLVED

United States Arbitration Act

9 U.S.C. § 2:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, of an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 3:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Securities Act of 1933

Section 12(2), 15 U.S.C. § 771(2):

> Any person who --

* * *

> (2) offers or sells a security (whether or not exempted by the provisions of section 77c of this title, other than paragraph (2) of subsection (a) of said section), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission.
>
> shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

Section 14, 15 U.S.C. § 77n:

> Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void.

Securities Exchange Act of 1934

Section 10, 15 U.S.C. § 78j(b):

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange --
>
> * * *
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Section 29(a), 15 U.S.C. § 78cc(a):

> Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.

Securities and Exchange Commission Regulation

Rule 10b-5, 17 C.F.R. § 240.10b-5:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

APPENDIX B

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Nos. 85-5512 and 85-5626
Non-Argument Calendar

IRENE S. GREENSTEIN, as Trustee
under trust document dated February 22, 1968,

Plaintiff-Appellant,

versus

FIRST BISCAYNE CORP., STEVEN J. HURTIG
and A. G. BECKER, INC.,

Defendants-Third Party
Plaintiffs-Appellees,

MELVYN GREENSTEIN,

Third Party Defendant.

Appeals from the United States District Court
for the Southern District of Florida

(December 18, 1986)

Before TJOFLAT, HATCHETT and CLARK, Circuit Judges.

PER CURIAM:

Irene S. Greenstein appeals from an order of the district court granting the defendants' motion to compel arbitration of her securities fraud claims brought under section 10(b) of the

Securities Exchange Act of 1934, 15 U.S.C. § 78(j)(b), and corresponding Securities and Exchange Commission Rule 10b-5, 17 C.F.R. § 240(10b)-5, based upon an arbitration agreement entered into before the claim arose. In light of our recent en banc decision holding that such claims are not subject to mandatory arbitration, we reverse and remand for further proceedings. *See Wolfe v. E.F. Hutton and Company, Inc.*, 800 F.2d 1032 (11th Cir. 1986).

REVERSED AND REMANDED

APPENDIX C

United States District Court
for the
Southern District of Florida

IRENE S. GREENSTEIN, as Trustee under trust document dated February 22, 1968,

Plaintiff,

CASE NO. 82-0584-Civ HASTINGS

vs.

FIRST BISCAYNE CORPORATION, STEVEN HURTIG and A.G. BECKER INCORPORATED,

Defendants.

A.G. BECKER INCORPORATED,

Third-Party Plaintiff,

vs.

MELVYN GREENSTEIN,

Third-Party Defendant.

ORDER DENYING MOTION FROM RELIEF FROM ORDER GRANTING MOTION TO COMPEL ARBITRATION

THIS CAUSE comes before the Court upon Plaintiff's Motion for Relief from Order Granting Motion to Compel Arbitration. Plaintiff bases her motion on the alleged untimeliness of Defendants' Motion to Compel Arbitration and upon pre-*Dean Witter Reynolds v. Byrd*, ____ U.S. ____, 105 S.Ct. 1238 (1985) SEC regulations stating that arbitration agreements do not bind customers to arbitration of Federal securities claims.

Defendants' Motion to Compel Arbitration cannot be viewed as untimely in that such a motion would have been futile prior to *Byrd* in light of this Circuit's now-overruled intertwining doctrine.

The prior SEC regulations do not persuade the Court as it has determined that the *Byrd* decision indicates the Supreme Court would permit compelled arbitration of section 10(b) claims. The Plaintiff is correct in that no Supreme Court case has as yet held that 10(b) claims *are* arbitrable and that this Court's order compelling arbitration was based on its interpretation of the *Byrd* dicta as well as the reasoning of subsequent District Court opinions interpreting *Byrd*. *See e.g. Niven v. Dean Witter Reynolds, Inc.*, 84-1594-Civ-T-10 (M.D. Fla., March 28, 1985); *Gregory v. Merril Lynch, Pierce, Fenner & Smith, Inc.*, No. 84-1647-Civ-T-10 (M.D. Fla. March 9, 1985).

Whether or not this Court's as well as those of the above mentioned District Court's conclusions on arbitration are correct is a matter for the Eleventh Circuit to determine on Plaintiff's pending appeal. Accordingly, it is hereby

ORDERED AND ADJUDGED that Plaintiff's Motion for Relief from Order Compelling Arbitration is DENIED.

DONE AND ORDERED this 15 day of July, 1985.

s/Alcee L. Hastings
ALCEE L. HASTINGS
UNITED STATES DISTRICT JUDGE

Copies to:

Richard Critchlow
Robert Pietrzak
Curtis Carlson
Robert Josefsberg

United States District Court
for the
Southern District of Florida

IRENE S. GREENSTEIN, as Trustee under trust document dated February 22, 1968,

Plaintiff,

vs.

FIRST BISCAYNE CORPORATION, STEVEN HURTIG and A.G. BECKER INCORPORATED,

Defendants.

CASE NO. 82-0584-Civ-HASTINGS

A.G. BECKER INCORPORATED,

Third-Party Plaintiff,

vs.

MELVYN GREENSTEIN,

Third-Party Defendant.

ORDER GRANTING MOTION TO COMPEL ARBITRATION; DENYING PLAINTIFF'S MOTION FOR LEAVE TO AMEND AND DISMISSING COMPLAINT WITH LEAVE TO REOPEN

ORDER OF DISMISSAL WITH LEAVE TO REOPEN

THIS CAUSE comes before the Court upon Defendant Becker Paribas Inc., Stephen Hurtig's and First Biscayne Corporation's Motion to Compel Arbitration and Stay and Plaintiff's Motion for Leave to Amend Complaint.

The Complaint involves a Federal Securities claim under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b); violation of Florida Securities laws F.S. §§ 517.301 and 517.211, and common law fraud and breach of fiduciary duty as well as negligence. The Defendants seek compelled arbitration of all claims pursuant to an agreement signed by the Plaintiff.

The Supreme Court in *Dean Witter Reynolds Inc. v. Byrd*, 53 U.S.L.W. 4222 (March 4, 1985) held that district courts are required to compel arbitration of the state claims when one of the parties files a motion to compel and an arbitration agreement has been signed.

The Supreme Court in *Byrd* left open the question of whether 10(b) securities claims are subject to arbitration because the defendant in that case had apparently assumed that the federal securities claims were not subject to arbitration under the holding of *Wilko v. Swan*, 346 U.S. 427 (1953). While declining to enter a holding on the issue because the parties had not raised it, the Supreme Court noted that *Wilko v. Swan* involved the issue of arbitrability of claims arising under § 12(2) of the Securities Act of 1933, 15 U.S.C. § 771 (2). The Court explained that § 12(2) contains an express provision which declares void any stipulation waiving compliance with a provision of the act and that an agreement to arbitrate amounted to a stipulation waiving the right to seek judicial review and was therefore void. *Byrd*, 53 U.S.L.W. at 4222 n. 1 The Court further noted that its subsequent opinion in *Scherk v. Albert Culver Co*, 417 U.S. 506, 512-13 (1974) had questioned the applicability of *Wilko* to a claim arising under 10(b) because that section does not expressly give rise to a private cause of action. *Id.*

Justice White entered a concurring opinion in *Byrd* in which he states that the opinions of the lower courts holding that 10(b) claims are non-arbitrable "must be viewed with some doubt."

While there exists precedent in our circuit holding that 10(b) claims are not arbitrable, e.g. *Sibley v. Tandy Corp.*, 543

F. 2d 540, 543 and n.3 (5th Cir. 1976) *cert. denied*, 434 U.S. 824 (1977), there is doubt that these decisions retain viability in light of the Supreme Court's ruling in *Byrd*.

This Court adopts the reasoning of Judge Hodges in *Gregory v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, Case No. 84-1647-Civ-T-10 (M.D. Fla. March 9, 1985) and *Niven v. Dean Witter Reynolds, Inc.* Case No. 84-1594-Civ-T-10 (M.D. Fla. March 28, 1985) based on Justice White's concurring opinion in *Byrd*, the reservations expressed by the Supreme Court in *Sherck v. Alberto-Culver Co.*, *supra* and the strong national policy favoring arbitration articulated in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1(1983) and finds that all claims shall proceed to arbitration.

The Defendants' Motion to Compel Arbitration will be granted and the cause will be dismissed with leave to reopen. The Defendants shall apply for arbitration within thirty days of receipt of this order. At the end of sixty days the Defendants are directed to file with the Court a report concerning the status of the arbitration proceedings at that time. Should Defendants fail to apply for arbitration within the alloted time the Plaintiff may move to reopen this cause. The arbitrators' final decision shall be filed with the Court.

Plaintiff, realizing the possible effect of the *Byrd* decision on the arbitrability of her cause of action, has moved for leave to amend her complaint to include a non-arbitrable § 12(2) claim. Allowing amendment at this late stage of the proceedings is within the sound discretion of the Court. *Chitmacha Tribe of Louisiana v. Harry L. Laws Co.*, 690 F. 2d 1157, 1163 (5th Cir. 1982). The Court should consider, among other factors, whether amendment would cause undue delay in the proceedings, whether amendment would lead to expeditious disposition of the merits of the litigation and judicial economy. *Id.*

As all the other claims have been compelled to arbitration, amendment would result in undue delay and would be counterproductive to expeditious resolution of the action. Accordingly, the motion for leave to amend will be denied.

Having reviewed the record in this cause and being otherwise duly advised it is hereby

ORDERED AND ADJUDGED that Defendants' Motion to Compel Arbitration is GRANTED. This cause is hereby DISMISSED WITH LEAVE TO REOPEN. It is further

ORDERED AND ADJUDGED that Plaintiff's Motion for Leave to Amend Complaint is DENIED.

DONE AND ORDERED this 16 day of May, 1985.

s/Alcee L. Hastings
ALCEE L. HASTINGS
UNITED STATES DISTRICT JUDGE

Copies to:

Robert Pietrzak
Robert J. Josefsberg
Curtis Carlson
Richard Critchlow

Having reviewed the record in this cause and being otherwise duly advised it is hereby

ORDERED AND ADJUDGED that Defendants' Motion to Compel Arbitration is GRANTED. This cause is hereby DISMISSED WITH LEAVE TO REOPEN. It is further

ORDERED AND ADJUDGED that Plaintiff's Motion for Leave to Amend Complain is DENIED.

DONE AND ORDERED this 16 day of May, 1985.

s/Alcee L. Hastings
ALCEE L. HASTINGS
UNITED STATES DISTRICT JUDGE

Copies to:

Robert Pietrzak
Robert J. Josefsberg
Curtis Carlson
Richard Critchlow

Supreme Court, U.S.
FILED
MAY 6 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1376

In The
Supreme Court of the United States
October Term, 1986

A.G. BECKER INCORPORATED,
Petitioner,

vs.

FIRST BISCAYNE CORPORATION, STEVEN J. HURTIG and IRENE S. GREENSTEIN, as Trustee under Trust Document Dated February 22, 1968,
Respondents,

MELVYN GREENSTEIN,
Third-Party Respondent.

RESPONDENT IRENE S. GREENSTEIN'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RICHARD H. CRITCHLOW
Counsel of Record for Respondent Irene S. Greenstein, as Trustee
777 Brickell Avenue, Suite 1000
Miami, Florida 33131
(305) 371-2600

Of Counsel:

RICHARD H. CRITCHLOW
MARA BETH SOMMERS
FINLEY, KUMBLE, WAGNER, HEINE, UNDERBERG, MANLEY, MYERSON & CASEY

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

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Wolfe v. E.F. Hutton & Company, Inc., 800 F.2d 1032 (11th Cir. 1987) (*en banc*) 1

STATUTES

Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) ..... *passim*

DEFINITIONS

1. Petitioner, A.G. Becker Incorporated, shall be referred to as "Becker".

2. Respondent/Plaintiff below, Irene S. Greenstein, as Trustee under Trust Document dated February 22, 1968, shall be referred to as "Greenstein".

3. Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), shall be referred to as "Section 10(b)".

REASONS FOR DENYING THE WRIT

Becker's argument on the merits does not belong in a petition for writ of *certiorari*. Moreover, its contentions are without merit. The Eleventh Circuit's decision rests upon sound reasoning and public policy in favor of upholding the right of access to the courts. *Wolfe v. E.F. Hutton & Company, Inc.*, 800 F.2d 1032 (11th Cir. 1986) (*en banc*). The "recent pronouncements" of this Court upon which other circuit courts have based their conflicting opinions actually are nothing more than *dicta*. At the time the appellate court considered the appeal in this case, the rule in the Eleventh Circuit was that agreements to arbitrate disputes under Section 10(b) were unenforceable and this Court still has not held otherwise. Therefore, the appellate court was correct in following precedent and reversing the district court's order compelling arbitration.

Greenstein does not dispute that there is a conflict among the circuit courts of appeals as to whether claims arising under Section 10(b) are subject to arbitration. However, even Becker acknowledges that the question presented by it already is before this Court in *McMahon v. Shearson/American Express, Inc.*, No. 86-44. Therefore, it is unnecessary for *certiorari* to be granted in this case and Becker's petition must be denied.

Greenstein raised two other grounds for reversal of the district court's order in addition to her argument that the arbitration agreement was unenforceable under the law of the Eleventh Circuit. Greenstein's second point on appeal was that the parties did not agree to arbitrate claims under the securities laws because the law at the

time the contract was executed prohibited enforcement of such agreements and the contract must be interpreted in that posture based on the presumption that parties enter into an agreement in contemplation of the applicable laws in existence at the time of the contract. *See, e.g., Morgan Stanley & Co., Incorporated v. Archer Daniels Midland Company,* 570 F. Supp. 1529, 1541-42 (S.D.N.Y. 1983). Greenstein's third point on appeal was that Becker waived its right to enforce the arbitration clause by waiting until the eve of trial to invoke it. This action was pending for three years and was twenty days away from trial when Becker moved to compel arbitration. During that three-year period, Becker took a position entirely inconsistent with enforcement of the arbitration clause by actively engaging in discovery and other pre-trial proceedings and filing counterclaims, crossclaims, third party claims and a pre-trial stipulation. At no time prior to the motion which is the subject of this petition was the arbitration clause raised by way of defense, motion or otherwise. Based on those facts, Greenstein contended that Becker waived its right to compel arbitration.

The Eleventh Circuit's opinion was silent as to those issues. (See Appendix B to Becker's Petition) In the event *certiorari* is granted, Greenstein respectfully requests that the issues raised by her second and third points on appeal be considered as well.

———o———

CONCLUSION

For the foregoing reasons, Becker's petition for a writ of *certiorari* must be denied. In the event the petition is granted, Greenstein respectfully requests this Court to consider all issues raised by her in her appeal to the Eleventh Circuit Court of Appeals.

DATED: Miami, Florida
April 30, 1987

Respectfully submitted,

RICHARD H. CRITCHLOW
Counsel of Record for Respondent Irene S. Greenstein, as Trustee
777 Brickell Avenue, Suite 1000
Miami, Florida 33131
(305) 371-2600

Of Counsel:

RICHARD H. CRITCHLOW, Esq.
MARA BETH SOMMERS, Esq.
FINLEY, KUMBLE, WAGNER, HEINE,
UNDERBERG, MANLEY, MYERSON & CASEY

Supreme Court, U.S.
FILED
MAY 15 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1376

In The
Supreme Court of the United States
October Term, 1986

—0—

A.G. BECKER, INCORPORATED
PETITIONER,

vs.

FIRST BISCAYNE CORPORATION, STEVEN J. HURTIG and IRENE S. GREENSTEIN, as Trustee under Trust Document Dated February 22, 1968,
RESPONDENTS,

MELVYN GREENSTEIN,
THIRD-PARTY RESPONDENT.

—0—

RESPONDENTS FIRST BISCAYNE CORPORATION and STEVEN J. HURTIG'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

—0—

STEVEN J. HURTIG
FOR RESPONDENTS FIRST BISCAYNE CORPORATION and STEVEN J. HURTIG
4651 Sheridan Street
Hollywood, Florida
33021
(305) 987-6660

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DEFINITIONS

1. Petitioner, A.G. Becker Incorporated, shall be referred to as "BECKER".
2. Respondent/Plaintiff below, Irene S. Greenstein, as Trustee under Trust Document dated February 22,1968, shall be referred to as "GREENSTEIN".
3. Respondent, First Biscayne Corporation, shall be referred to as "FIRST BISCAYNE".
4. Respondent, Steven J. Hurtig, shall be referred to as "HURTIG".

REASONS FOR GRANTING THE WRIT

Upon review and examination of the Brief's presented by "Becker" and "Greenstein", Respondents "First Biscayne" and "Hurtig" concur and support the position and arguments presented in the "Becker" Brief requesting this Court take jurisdiction of the matter. Due to the conflicting opinions filed by the Eleventh, First and Eighth Circuits, it would be in the public's best interest to eliminate the Confusion caused by the Appellate Courts, in their prior decisions.

This resolution would aid in the determent of unnecessary litigation in that a clear policy decision would be made that is applicable to all the Courts in Florida.

Respondents, "First Biscayne" and "Hurtig" respectfully requests that all matters raised and argued in the "Becker"

Brief be deemed raised and argued by Respondents, herein.

———————0———————

CONCLUSION

For the foregoing reasons, Becker's Petition for a writ of *certiorari* must be granted.

DATED: Hollywood, Florida
May 6, 1987

Respectfully Submitted,

STEVEN J. HURTIG
FOR RESPONDENTS FIRST BISCAYNE CORPORATION and STEVEN J. HURTIG
4651 Sheridan Street
Hollywood, Florida
33021
(305) 987-6660

CERTIFICATE OF SERVICE

This will certify that true and correct copies of the foregoing Brief in Support of Petition for Writ of Certiorari have been deposited, by firstclass, postage pre-paid, with the United States Postal Service, and addressed to:

Richard H. Critchlow,Esq.
Finley, Kumble, Wagner,
Heine, Underberg, Manley
and Casey
777 Brickell Avenue
Suite 1000
Miami, Florida 33131

Counsel of Record for
Respondent Irene S.
Greenstein
(3 Copies)

A. Robert Pietrzak,Esq.
Brown & Wood Attorney's
at Law
One World Trade Center
57th Floor
New York, New York 10048

Counsel of Record for
Petitioner A.G. Becker
Incorporated
(3 Copies)